



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MDV-40/56406

PRELIMINARY RECITALS

Pursuant to a petition filed January 16, 2003, under Wis. Stat. §49.45(5) and Wis. Admin. Code §HA 3.03(1), to review a decision by the Milwaukee County Department of Human Services in regard to Family Care/Community Waiver Medical Assistance (MA), a hearing was held on March 27, 2003, at Milwaukee, Wisconsin.

The issue for determination is whether the county agency correctly determined that the petitioner was ineligible for Family Care/Community Waiver MA payments due to divestment of assets.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Represented by:

Atty. Anne L. De Leo
2401 N Mayfair Rd., Suite 210
Wauwatosa, WI 53226

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: Nancy Haendel, ES Spec.
Milwaukee County Dept. of Human Services
235 W. Galena, 4th floor
Milwaukee, WI 53212

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Milwaukee County.
2. The petitioner resided in Community-Based Residential Facilities from April, 2000, onward.
3. The petitioner applied and was found eligible for Family Care MA in June, 2002.

4. The petitioner made serial gifts, via checks, to her daughter. Specifically, she made \$100 gifts on May 29, June 21, July 15, August 19, September 26, October 10, and November 10, 2002. See Exhibit 2-B.
5. On December 20, 2002, the petitioner sold her residence and received a net payment of \$27,028.10, which was deposited into her checking account. On December 27, 2002, the petitioner signed a check to (daughter) for \$27,000. See Exhibit 2-C.
6. On January 10, 2003, (daughter), who is now the petitioner's attorney-in-fact, appeared at the county agency. She reported and verified that the petitioner had made the divestments/gifts described in Findings #4 and #5.
7. On January 6, 2003, the county agency issued written notice to the petitioner advising that her Community Waiver/Family Care MA benefits would be discontinued effective February 1, 2003. The basis for discontinuance was "improper transfer of assets has occurred" (i.e., divestment). See Exhibit 1. The agency did not issue a separate notice to the petitioner advising her of the length of the divestment disqualification period

DISCUSSION

A divestment is a transfer of assets for less than fair market value. Sec. 49.453(2)(a), Wis. Stats.; *Medicaid Eligibility Management Handbook (MEMH)*, Appendix 14.2.1 (01-01-02). A divestment or divestments made within 36 months (60 months if the divestment is to an irrevocable trust) before an application for nursing home MA may cause ineligibility for that type of MA. Sec. 49.453(1)(f), Stats.; *MEMH*, App. 14.3.0. The ineligibility is only for nursing home care; divestment does not impact on eligibility for other medical services such as medical care, medications, and medical equipment (all of which are known as "MA card services" in the parlance). The penalty period is specified in sec. 49.453(3), Stats., to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services (from May through December, 2002, \$4,292). *MEMH*, Appendix 14.5.0. In this case, the agency improperly failed to calculate a disqualification period. If it had done so, the disqualification period would have been six months (\$27,000 divided by \$4,292).

In this case, multiple, consecutive divesting transfers occurred from May through December, 2002. "Multiple divestments" are two or more separate divestments made within a 36-month period before the MA application date or the date of entering an institution, or at any time thereafter. More specifically, the *MEMH* characterizes a multiple divestment as follows:

1. Add together all the divested amounts of transfers in the look-back period or any time thereafter that are connected in any of the following ways:
 - a. Transfers that occur in the same month;
 - b. Transfers that occur in both months of a period of any two consecutive months;
 - c. Transfers with a penalty period (14.5.0) that extends into a month in which there is another transfer; or,
 - d. Transfers with a penalty period (14.5.0) that extends into the month immediately preceding a month in which there is another transfer.
2. Calculate the penalty period (14.5.0).

...

If there are transfers in the lookback period which are not connected in any of the ways described above, treat them

as separate and calculate a separate penalty period (14.5.0) for each.

See *MEMH*, App. 14.6.0 (4-1-03). All of the transfers that occurred here were in consecutive months, and they must therefore be treated as “multiple divestments.”

The county agency treated the single event of the \$27,000 December, 2002, transfer as a single divestment, disregarding the petitioner’s assertions of the other, much smaller, divestments from May through November, 2002. The agency imposed a penalty period of unknown duration, but presumably it would have turned out to be six months, beginning in the month of December, 2002.

The petitioner asserts that all of the transfers listed in Findings #4 and #5 are all divestments, as they were gifted sums not exchanged for fair market value. She further asserts that this scenario requires the multiple divestment policy be applied. This means that the value of all the divested sums must be added together, then divided by the average monthly cost of a nursing home, to arrive at the penalty period, and the penalty period would begin on the month of the first of the sequence of multiple divestments.

The petitioner is correct in her assertion. This issue has previously been decided in a proposed decision that was approved by the Secretary of the Department of Health and Family Services: Final Decision No. MDV-40/52546 (Div. of Hearings & Appeals May 29, 2002). That decision holds that multiple divestments are to be treated as the petitioner asserts here. Said decision is binding on this administrative law judge. Thus, I conclude that this fact pattern should have been treated as a multiple divestment with a total divested amount of \$27,700 (\$27,000 plus the seven \$100 gifts), and a disqualification period of six months. The disqualification period should have begun with the month of the first transfer, May, 2002.

CONCLUSIONS OF LAW

1. The agency incorrectly determined that the petitioner divested \$27,000 as one event in December, 2002.
2. The petitioner performed a multiple divestment with a total value of \$27,700, beginning in May, 2002. As a result, she was ineligible for Community Waiver/Family Care MA for six months, from May through October, 2002.

NOW, THEREFORE, it is

ORDERED

That the petition be remanded to the county agency with instructions to reinstate the petitioner’s Community Waiver MA and Family Care MA benefits effective February 1, 2003, if she was otherwise eligible, and rescind any divestment disqualification period placed on the petitioner’s case, other than for the months of May through October, 2002. These actions shall be taken within 10 days of the date of this Decision.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this 9th day of
April, 2003

/sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals
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